IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9027 of 2003
and
SPECIAL CIVIL APPLICATION No 9028 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CORE HEALTHCARE LIMITED

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 9027 of 2003
MR SN SOPARKAR, Sr.Advocate with MR AMAR N BHATT
for Petitioner No. 1
MR SIRAJ GORI, AGP for Respondent No. 1

2. Special Civil Application No. 9028 of 2003
MR SN SOPARKAR, Sr.Advocate with MR AMAR N BHATT
for Petitioner No. 1
MR SIRAJ GORI, AGP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 31/03/2004

COMMON CAV JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Both these petitions are filed by the same Company-Core Healthcare Limited which has set up -

(i) four projects at village Sachana, Near Viramgam in Ahmedabad (Rural) District for manufacturing I.V. Fluids, healthcare products and pharmaceutical products in or about 1984; and

(ii) a project at village Rajpur, Taluka Kadi in Mehsana District for manufacturing I.V. Fluids and pharmaceutical products in or about 1988.

Special Civil Application No.9027 of 2003 pertains to sales-tax dues for the projects at village Sachana and Special Civil Application No.9028 of 2003 pertains to sales-tax dues for the project at village Rajpur. Both the petitions raise common questions of law and fact and are, therefore, heard together and are being disposed of by this common judgment.

2. Both the petitions raise a common question about powers of the State Government in the Sales-tax Department to recover sales-tax dues from the petitioner-Company on the products being sold by it. The petitioner claims immunity from any coercive recovery of sales-tax dues on the ground that the petitioner is registered as a sick industrial Company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 ("the SICA" or "the Act" for short). The petitions involve two controversies -

(i) whether any inquiry is pending under Section 16(1) so as to entitle the petitioner to protection under Section 22 of the SICA; and

(ii) if yes, whether the petitioner is entitled to the protection under Section 22 of the SICA in respect of the current sales-tax dues which the petitioner is collecting from the purchasers for the period during pendency of the reference before the BIFR.

3. On the basis of its financial position as on 31.3.2000, the petitioner approached the BIFR and a reference was registered as Case No.149 of 2001 which is for the entire Company i.e. for all the projects at village Sachana in Ahmedabad (Rural) District and at village Rajpur in Mehsana District. However, by order

dated 24.1.2002 the said reference was rejected by the BIFR on the ground that it was time barred. Aggrieved by the said order, the petitioner preferred Appeal No.74 of 2003 before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) under Section 25 of the SICA. The appeal was filed on 24.2.2003 and was listed for hearing on 16.6.2003. Thereafter the appeal was fixed for hearing on 19.9.2003. In the meantime, the petitioner has filed both these petitions on 1/2.7.2003 challenging the demand notices and orders for attachment of the bank accounts and also the subsequent notices issued by the sales-tax department for recovery of the sales-tax dues and for initiating criminal proceedings against the petitioner and/or its Directors for recovery of sales-tax.

4. The petitioner has also contended in Special Civil Application No.9027 of 2003 that out of the four projects at village Sachana in Ahmedabad (Rural) District, the petitioner was granted sales-tax exemption for three projects, namely KVP, MDD and NOVA. As far as the fourth project i.e. SVP is concerned, since the project was completed in August 1998 instead of February, 1998, the petitioner was not granted sales-tax exemption although the petitioner had made eligible investment worth Rs.75 lakhs. The State Government has pointed out that the application for sales-tax exemption was already rejected on 3.6.2003.

5. During pendency of these petitions, the first controversy about pendency of the reference/inquiry has assumed a different complexion, because the petitioner submitted applications to the BIFR for registration as a sick industrial Company even for the subsequent years (ending on 31st March 2001, 2002 and 2003 respectively) and as per the three BIFR communications dated 19th January 2004, the petitioner-Company has been registered as a sick industrial Company in Case Nos.30, 31 and 32 of 2004.

6. The stand of the respondents in the affidavits in reply is that since the BIFR had rejected the reference on 24.1.2002, there was no pending reference and, therefore, the protection under Section 22 of the SICA was not available to the petitioner. It is further contended that, in any view of the matter, the protection under Section 22 of the SICA would be available only in respect of those amounts of sales-tax which were due on the date of filing of the reference before the BIFR i.e. 18.6.2001. On that day, the following sales-tax amounts were payable by the petitioner to the State Government :-

Assessment Year	SCA No.9027/03 in (Rs.)	SCA No.9028/03 in (Rs.)
1992-93	54,67,000	
1993-94		21,54,394
1994-95		86,27,240
1998-99	74,33,331	
1999-2000	1,27,04,666	
2000-01	24,27,321	
Total	2,25,65,318	1,62,48,634
Rounded off	(2.26 Crores)	(1.62 Crores)

Total Rs.3.88 Crores

However, the current sales-tax dues which are payable after the date of registration before the BIFR are payable by the petitioner and that no protection is available to the petitioner for the current sales-tax dues as the petitioner is collecting sales-tax from the purchasers as a trustee of the State, and the petitioner has to pay over the sales-tax amounts collected from the purchasers. It is further submitted that even for the period prior to the date of registration before the BIFR, the petitioner is required to pay the sales-tax dues for which the petitioner had obtained the benefit of sales-tax deferment. The petitioner had collected the said tax from the purchasers and had retained the same pursuant to the sales-tax deferment scheme and the petitioner was permitted to retain the said amounts only for a specified period as stipulated in the scheme and after the period of the scheme is over, the sales-tax amounts collected by the petitioner from the general public and retained by it as a trustee of the State have to be paid over to the State Government.

7. At the hearing of these petitions, Mr SN Soparkar instructed by Mr Amar Bhatt, learned counsel for the petitioner has raised the following contentions :-

7.1 Even after the BIFR rejected the petitioner's reference on 24.1.2002, the petitioner's appeal under Section 25 of the SICA has been pending and, therefore, during pendency of the appeal also the petitioner is entitled to protection under Section 22 of the SICA.

In any view of the matter, once the BIFR has

granted the petitioner registration as a sick industrial Company as per communications dated 19.1.2004, there can be no manner of doubt that the inquiry under Section 16 is pending. In support of the said contention, strong reliance has been placed on the decision of the Apex Court in Real Value Appliances Ltd. vs. Canara Bank, (1998) 93 Comp.Cases 26 laying down that once the reference is registered, then an inquiry under Section 16(1) is deemed to have commenced and that Section 22 and the prohibitions contained therein shall immediately come into play.

7.2 In Tata Davy Ltd. vs. State of Orissa, (1998) 111 STC 462, the Apex Court has held that arrears of taxes and the like due from sick industrial Companies that satisfy the conditions set out in Section 22(1) of the SICA cannot be recovered by coercive process unless the BIFR gives its consent therefor. Reliance is also placed on the decision of the Punjab & Haryana High Court in Industrial Cables (I) Ltd. vs. State of Punjab, (2001) 105 Comp.Cases 541 and on the decision of the Kerala High Court in Modistone Ltd. vs. State of Kerala, (2001) 105 Comp.Cases 183.

8. On the other hand, Mr Siraj Gori, learned AGP for the respondent-Sales-tax authorities has made the following submissions :-

8.1 When the petitions were filed, only the petitioner's appeal before the Appellate Authority (AAIFR) was pending under Section 25 of the Act, but pendency of such appeal did not mean that inquiry under Section 16(1) of the Act was pending and, therefore, the petitioner was not entitled to suspension of the recovery proceedings under the Sales-tax Act. Strong reliance is placed on the decision of the Delhi High Court in IDBI vs. Surekha Coated Tubes & Sheets Ltd., (1996) 85 Comp.Cases 594.

8.2 Even otherwise, registration of the petitioner-Company as a sick industrial Company by itself does not mean commencement of inquiry under Section 16(1) because in the facts of the instant case, the BIFR has not called for any information or document while communicating the registration of the petitioner-Company as a sick industrial Company. The letters dated 19.1.2004 clearly indicate that no such information/documents is called for. Hence, the ratio of the decision in Real Value Appliances Ltd. will not apply unless any such information or document is called for, in which case alone it can be said that there was

commencement of inquiry under Section 16(1) of the SICA for the purposes of Section 22(1) of the Act.

8.3 Assuming that any inquiry is pending under Section 16(1) of the Act, even then the petitioner is not entitled to claim any immunity from recovery of sales-tax dues because sales-tax is what the petitioner is required to collect as an agent of the State or as a trustee of the State and the amounts of sales-tax so collected never belong to the petitioner-Company. Therefore, they are never the properties of the Company and, therefore, Section 22 conferring protection on the properties of the Company cannot apply to recovery of sales-tax dues.

8.4 In the alternative, in any view of the matter, even if the past sales-tax dues recovered from the purchasers can be treated as a part of the property of the Company, the petitioner is not entitled to retain the sales tax collected after registration of the Company as a sick industrial Company and the State Government cannot be expected to wait for the entire period till the scheme for rehabilitation and revival of the sick Company may or may not be finalized and sanctioned by the BIFR which process ordinarily takes about two to three years. The State Government is being deprived of the sales-tax dues payable by the petitioner for the last ten years as per the following particulars:

Assessment Year	SCA No.9027/03	SCA No.9028/03
1992-93		54,67,000
1993-94		21,54,394
1994-95		86,27,240
1995-96		90,29,928
1996-97		75,54,156
1997-98		6,62,152
1998-99	74,33,331	20,67,022
1999-2000	1,27,04,666	
2000-01	24,27,321	
2001-02	46,22,197	
2002-03	1,04,85,002	
1.4.03 to 31.12.2003	2,74,67,119	
Last instalment of deferred payment due		8,33,334

on 31.5.2001

	6,51,39,636	3,63,95,226
Rounded off	Rs.6.51 Crores	Rs.3.64 Crores
Total	Rs.10.15 Crores	

Note 1 -Spl. CA No. 9027 of 2003

The petitioner's application for sales-tax exemption was already rejected on 3.6.2003.

Note 2 -Spl. CA No. 9028 of 2003

The petitioner enjoyed the benefit of sales-tax deferment and paid five instalments, but defaulted in the sixth instalment of Rs.8,33,304/- which was due on 31.5.2001.

8.5 The Gujarat Electricity Board is not bound to supply electricity without demanding charges for current supply. Similarly, the State cannot be deprived of the amounts of sales-tax being collected by the petitioner either by separately collecting the same from the purchasers or by including sales-tax as a component of the sale price charged from its purchasers.

9. Before dealing with the rival submissions, it is necessary to make a brief reference to the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.

There is no dispute about the definition of "sick industrial Company" as defined by Section 3(o) and various other expressions, Chapter III covers references, inquiries and schemes. Sub-section (1) of Section 15 requires the Board of Directors of a sick industrial Company to make a reference to the BIFR within two months from the date of finalization of the audited accounts of the Company for the financial year in which the Company has become a sick industrial Company. Sub-section (2) empowers the public authorities/financial institutions or scheduled banks to make such reference. Section 16 reads as under :-

"16. Inquiry into working of sick industrial Companies.- (1) The Board may make such inquiry

as it may deem fit for determining whether any industrial Company has become a sick industrial Company-

(a) upon receipt of a reference with respect to such Company under Section 15; or

(b) ....

(2) The Board may, if it deems necessary or expedient so to do for the expeditious disposal of an inquiry under sub-section (1), require by order any operating agency to enquire into and make a report with respect to such matters as may be specified in the order.

(3) The Board or, as the case may be, the operating agency shall complete its inquiry as expeditiously as possible and endeavour shall be made to complete the inquiry within sixty days from the commencement of the inquiry.

Explanation - For the purposes of this sub-section, an inquiry shall be deemed to have commenced upon the receipt by the Board of any reference or information or upon its own knowledge reduced to writing by the Board.

(4) ....

Under Section 17, after completion of the inquiry whether it is practicable for the Company to make its net worth exceed the accumulated losses within a reasonable time, the Board shall give such Company time to make its net worth exceed the accumulated losses subject to appropriate restrictions and conditions. If the Board decides that it is not practicable for the Company to do so within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in Section 18, the Board may direct any operating agency to prepare a scheme providing for revival and rehabilitation of the Company.

Section 18 provides for preparation and sanction of the scheme for revival and rehabilitation of the sick Company as expeditiously as possible and ordinarily within a period of ninety days providing for various measures including the financial reconstruction of the sick industrial Company, as may be appropriate.

Section 19, which has a very important bearing on the controversy involved in the present petitions, reads

as under :-

"19. Rehabilitation by giving financial assistance.- (1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial Company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick industrial Company.

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation or within such further period, not exceeding sixty days, as may be allowed by the Board, and if no consent is received within such period or further period, it shall be deemed that consent has been given.

(3) Where in respect of any scheme the consent referred to in sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.

(3A) On the sanction of the scheme under sub-section (3), the financial institutions and the banks required to provide financial assistance shall designate by mutual agreement a financial institution and a bank from amongst themselves which shall be responsible to disburse financial assistance by way of loans or advances or guarantees or reliefs or concessions or sacrifices agreed to be provided or granted under the scheme on behalf of all financial institutions and banks concerned.

(3B) The financial institution and the bank

designated under sub-section (3A) shall forthwith proceed to release the financial assistance to the sick industrial Company in fulfillment of the requirement in this regard.

(4) Where in respect of any scheme consent under sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial Company, as it may deem fit.

(emphasis supplied)

Section 19A provides that at any time before completion of the inquiry under Section 16, an interim arrangement may be made for continuing the operations of the sick industrial Company or for the financial reconstruction of the sick industrial Company.

Section 20 provides that where the Board after making inquiry under Section 16 and after considering all the relevant facts and circumstances and after giving an opportunity of hearing to all concerned parties, is of opinion that the sick industrial Company is not likely to recover from sickness within a reasonable time and that the Company is not likely to become viable in future and that it is just and equitable that the Company should be would up, it may record and forward its opinion to the concerned High Court which may proceed with the winding up of the sick industrial Company in accordance with the provisions of the Companies Act.

Sub-section (1) of Section 22 reads as under :-

"22.(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where as appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial Company or for the appointment of a receiver in

respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

It is in light of the aforesaid statutory provisions that the controversies arising in these petitions are required to be examined.

10. We will first take up the preliminary contention raised by Mr Gori, learned AGP for the respondents that no inquiry under Section 16(1) of the Act is pending even now. As far as the pendency of the appeal before the Appellate Authority under Section 25 of the Act is concerned, Mr Gori has heavily relied on the decision of the Delhi High Court in IDBI vs. Surekha Coated Tubes and Sheets Ltd., (1996) 85 Comp.Cases 594 laying down that the protection under Section 22 is not available during pendency of the appeal against rejection of a reference by the BIFR. Mr Soparkar for the petitioner has submitted that the said decision does not lay down the correct law. It is, however, not necessary to go into this debate because during pendency of these petitions, the petitioner Company has already been registered as a sick industrial Company on 19.1.2004.

11. It is now necessary to examine the contention of the learned AGP that even the registration of the reference on 19.1.2004 does not necessarily confer protection of Section 22 on the petitioner because inquiry under Section 16(1) has not yet commenced. It is submitted that the principle laid down by the Apex Court in Real Value Appliances Ltd., (1998) 93 Comp.Cases 26 can come into play only after the BIFR calls for information or documents under Regulation 19(5) of the Board for Industrial and Financial Reconstruction Regulations, 1987. The letters dated 19.1.2004 of the BIFR read as under (similar for all three years except the year) :-

"I am directed to refer to your reference dated 01.11.2003 (filed on the basis of audited accounts as on 31.3.2001) and to say that the reference received on 19.11.2003 stands registered as Case No.30/2004.

You are hereby directed to send a copy of

the Form - "A" alongwith its enclosures filed by you to the concerned State Government, Banks and financial Institutions immediately and report the compliance of the direction to the undersigned within 15 days of the receipt of this letter."

Since no information or documents are called for by the BIFR, the learned AGP submits, the inquiry has not yet commenced.

12. It is true that in the Real Value Appliances case (Supra), the Apex Court has partly based its decision on the language of Regulation 19(5) which reads as under :-

"Regln.19(5).- If on scrutiny, the reference is found to be in order, it shall be registered, assigned a serial number and submitted to the chairman or assigning it to a Bench. Simultaneously, remaining information/documents required, if any, shall be called for from the informant."

(emphasis supplied)

However, the following observations made by the Apex Court in the same case leave no room for doubt that registration of the reference itself amounts to commencement of inquiry under Section 16(1) for the purposes of Section 22 of the SICA :-

"Relying on the use of the word "may" in section 16(1) of the Act it has been contended in some High Courts that the word "may" in that section shows that the BIFR has power to reject a reference summarily without going into the merits and that it is only when the BIFR takes up the reference for consideration on the merits under section 16(1) that it can be said that the "inquiry" as contemplated by the section has commenced. It is argued that if the reference before the BIFR is only at the stage of registration under section 15, then section 22 is not attracted. This contention, in our opinion, has no merit. In our view, when section 16(1) says that the BIFR can conduct the inquiry "in such manner as it may deem fit", the said words are intended only to convey that a wide discretion is vested in the BIFR in regard to the procedure it may follow for conducting an inquiry under section 16(1) and nothing more. In fact, once the reference is registered after scrutiny,

it is, in our view, mandatory for the BIFR to conduct an inquiry. If one looks at the format of the reference as prescribed in the Regulations, it will be clear that it contains more than fifty columns regarding extensive financial details of the company's assets, liabilities, etc. Indeed, it will be practically impossible for the BIFR to reject a reference outright without calling for information/documents or without hearing the company or other parties."

(emphasis supplied)

We are, therefore, of the view that in the case of the petitioner-Company the inquiry under Section 16(1) of the Act has commenced on 19.1.2004. Hence, the preliminary submission made by the learned AGP that the inquiry under Section 16(1) as contemplated by Section 22 of the Act has not commenced is overruled.

13. Coming to the second controversy in these petitions - whether the sales-tax dues are properties of the Company within the meaning of Section 22 of the Act, we find that in Vijay Mills Co.Ltd. vs. State of Gujarat, (1999) 68 Comp.Cases 597, a Division Bench of this Court has taken the view that when an industrial Company, which is a dealer, recovers sales-tax from its purchasers, it is required to pay the sales-tax to the appropriate Government within the stipulated time. Meanwhile, the Company holds the money not as owner, but in trust for the Government. Therefore, when criminal proceedings are instituted against such an industrial Company for failure to pay sales-tax to the Government, it cannot be said that the proceedings are for winding up the industrial Company or for execution, distress or the like against the properties of the industrial Company. What was challenged in that decision was sanction of the prosecution by the Commissioner of Sales-tax and the Court held that Section 22(1) does not contain any such prohibition against sanction being granted for prosecution.

14. In our view, the controversy about the power of the State to recover SALES-TAX DUES and the protection available to a sick industrial Company under Section 22 of the SICA is required to be examined with reference to three periods -

(i) the period upto the date of registration of the Company as a sick industrial Company under Section 15 of the Act, which is also the date of commencement of

the inquiry;

(ii) the period commencing from the date of registration of the sick industrial Company by the BIFR till sanction of the rehabilitation scheme by the BIFR; and

(iii) the period after the date of sanction of the rehabilitation scheme.

15. There is no dispute about the third period. The decisions of the Apex Court in Dy.CTO vs. Corromandal Pharmaceuticals, (1997) 105 STC 327 and in Tata Davy Ltd. vs. State of Orissa, (1998) 111 STC 462 clearly lay down that the amounts like the sales-tax which the industrial Company is enabled to collect after the date of the sanction of the scheme, legitimately belong to the revenue and such amounts cannot be and could not have been intended to be covered by Section 22 of the Act.

16. As far as the first period is concerned, this Court is of the view that even though the sick industrial Company which is a dealer registered under the Gujarat Sales-tax Act and the Central Sales-tax Act collects sales-tax as an agent of the State, as far as the arrears of sales-tax till the date of registration of the reference are concerned, the amounts received by the Company have been intermingled with the other properties of the Company and, therefore, the State is prohibited from recovering such arrears from any particular property of the Company without obtaining prior consent of the BIFR.

17. The question is whether the same principle or protection will be available to the sick industrial Company for the current period i.e. after the date of registration of the reference till the rehabilitation scheme is sanctioned by the BIFR. Before expressing any opinion on this aspect, it is necessary to carefully refer to the provisions of Section 19 of the SICA. Sub-section (1) of Section 19 states that the scheme to be prepared for revival and rehabilitation of the sick industrial Company may provide for financial assistance -

(a) by way of loans, advances or guarantees by public financial institutions or scheduled banks;

and/or

(b) reliefs or concessions or sacrifices from the Central Government, State Governments and other public financial institutions

or scheduled banks;

There is no dispute that the petitioner-Company seeks reliefs or concessions from the State Government in respect of the sales-tax dues.

Sub-section (2) specifically provides that such a draft scheme has to be circulated to every person required by the scheme to provide financial assistance for his consent within 60 days from the date of circulation or within such further period (maximum 60 days) as may be allowed by the Board and if no consent is received within such period or further period, it shall be deemed that consent has been given. Sub-section (4) provides that where consent is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including winding up of the sick industrial Company as it may deem fit.

The aforesaid provisions make it clear that the rehabilitation scheme cannot provide for any reliefs or concessions or sacrifices from the State Government without the consent of the State Government. Hence, it is open to the State Government to insist that although it will not make recovery of past sales-tax dues without the consent of the BIFR, atleast the industrial Company is bound to pay over the sales-tax amounts BEING COLLECTED by the Company from the purchasers.

We, therefore, find substance in the submission made by the learned AGP that even if the State Government may have to wait for recovery of the past sales-tax dues, but the State Government is not bound to wait for saying "we do not want to give any concessions or reliefs hereafter in respect of sales-tax being collected by the Company" till the rehabilitation scheme is considered, approved or rejected by the BIFR.

18. In Corromandal case (1997) 105 STC 327, the Apex Court has held that the sales-tax collected by the Company after the date of sanction of the rehabilitation scheme legitimately belong to the State and, therefore, the State cannot be prevented from collecting such dues. The sales-tax dues for the second period (i.e. till the date of sanction of the scheme) as such legitimately belong to the State.

In Kanoria Dyechem Ltd. case (2002) 108 Comp.Cases 620, the draft scheme presented at the hearing held before the BIFR on January 3, 2001, provided for cut

off date of June 30, 2001 for crystallization of the dues of the sick Company. Hence, by order dated 3.9.2001, this Court restrained the Government from making any recovery of the sales-tax dues only for the period till June 30, 2001, except in accordance with such scheme for revival and rehabilitation as may be framed by the BIFR or after obtaining prior approval of the BIFR, subject to the condition that the petitioner-Company shall pay its sales tax dues for the period from July 1, 2001 onwards regularly and in accordance with law and the Court also directed the petitioner-Company to inform the respondent-authorities about the progress and/or failure of the scheme before the BIFR and the final outcome of the proceedings before the BIFR as and when they stand concluded before the BIFR.

It is, therefore, clear that even before the scheme for revival and rehabilitation of the Company is to be taken up for consideration and, therefore, even before it is sanctioned, a Company registered as a sick industrial Company can be required to pay current sales-tax dues.

19. The contention urged on behalf of the petitioner is that the State Government must wait till the BIFR gets a draft revival scheme prepared and a cut off date is provided therein. The State Government's reply is that judicial notice has been taken in Corromandal case that all this process takes many years and till then the Company cannot be allowed to retain sales-tax amounts being collected by it from the customers, just as the Gujarat Electricity Board cannot be compelled to supply electricity to a sick Company without getting price for the same.

We do find considerable substance in the above reply of the State Government. The petitioner's obligation to pay the State Government current sales-tax amounts being collected by the petitioner from its purchasers cannot be placed on a lower footing than the payment of price by the Company to the suppliers of goods and services. We would hasten to add that when the incidence of tax is being passed on by the seller to its purchasers, whether by separately recovering sales-tax or by including sales-tax as a component of the sale price, the Company has no right to retain such current sales-tax amounts.

If the petitioner's contention is accepted, it would amount to the Court directing the State Government to give the petitioner-Company the benefit of sales-tax

deferment. It would be in the nature of relief or concession from the State Government. Section 22(1) grants protection in the nature of status quo regarding recovery of past dues, but the provision does not even purport to compel the State Government or any other creditor to grant such relief, concession or sacrifice for the current dues (i.e. dues for the current period) for which the consent of the creditor is absolutely necessary. Neither the Court nor the BIFR has power to compel the Government to defer recovery of current sales-tax amounts from the Company which is collecting the sales-tax from its own purchasers.

20. As per the judicial notice taken by the Apex Court in Corromandal case, the proceedings before the BIFR take long time. The time limits is various provisions of the Act for completion of inquiry, preparation of scheme etc. are held to be directory and not mandatory (vide Industrial Cables vs. State of Punjab, 105 Comp.Cases 541). Let us assume that in the facts of this case, the inquiry under Section 16(1) will take a few months, the Operating Agency will be appointed and the draft scheme will be prepared and circulated by 31.3.2005 and the cut off date is fixed as 1.4.2005. If the objections to the draft scheme are to be considered and ultimately the BIFR sanctions the scheme on 31.3.2006, according to the petitioner, the State Government can recover the sales-tax dues only with effect from 1.4.2006 and not prior thereto in view of the principles laid down in Tata Davy's case (Supra). (Without prejudice to the contention of the State Government that the sales-tax amounts collected by the petitioner are not the properties of the petitioner-Company so as to fall under Section 22 of the Act), the stand of the respondent-State Government is that since the State Government has a right to refuse its consent for any sales-tax reliefs or concessions to be granted even for the past period, the State Government is atleast entitled to say that from now onwards the sales-tax dues will have to be paid by the Company because the sales-tax amounts are collected by the Company as an agent of the State, if not as a trustee of the State.

21. Having carefully considered the controversy, we are of the view that even though the industrial Company which is a dealer registered under the Gujarat Sales-tax Act and Central Sales-tax Act collects sales-tax as an agent of the State, as far as the arrears of sales-tax for the past period are concerned, the amounts collected by the Company having been intermingled with the

properties of the Company, it would not be possible for the State to recover such arrears from any particular property of the Company on account of the prohibition contained in Section 22(1) of the SICA, but atleast as far as the future period is concerned, the State Government is entitled in law to assert that henceforth the registered dealer shall not intermingle the sales-tax amounts with the properties of the Company. The provisions of sub-section (2) of Section 19 of the SICA clearly entitle the State Government to refuse to give consent to provide any financial assistance to the sick industrial Company in the form of tax deferment or any other reliefs. There is no reason why the State Government cannot say at the outset that the State Government does not want to give any relief or concession to the industrial Company for the current tax amounts and, therefore, whatever sales-tax is being collected has to be paid over by the Company to the State Government.

22. In our order dated 5.2.2004 in Special Civil Application No.133 of 2004, this Court has made the following observations :-

> "When a sick company recovers sales tax from the purchasers of its goods, it is really collecting sales tax on behalf of the State and, therefore, it cannot be permitted to recover sales tax from the purchasers and refuse to hand over the same to the revenue. As far as income tax liability is concerned, when the petitioner would be selling its goods to a third party, the purchase price being recovered from the purchasers would not be on behalf of the Income-tax authorities. Since the petitioner is registered as a sick company by BIFR, it is not very likely that the petitioner would be required to pay income tax on the purchase price to be recovered from the purchasers of its goods. Income-tax is a tax on income and it is only after the petitioner would earn taxable income which would be computed in accordance with the provisions of the Income-tax Act that it would be liable to pay tax. Hence, the question of liability under the Income-tax Act on future income would not arise at this stage. The recovery presently sought to be made by the department is of arrears of Income tax for the past period for which the petitioner has already approached the BIFR. Under the circumstances, protection under section 22 of the SICA would be available to the petitioner in respect of the arrears of Income-tax."

(emphasis supplied)

23. The view that we are taking does not run counter to the decisions being relied upon for the petitioner. On carefully going through them, we have noticed that in none of them have the Courts countenanced a Company registered as a sick industrial Company retaining current sales-tax amounts being collected by the Company from its customers during pendency of the reference under the garb of protection under Section 22(1), which, in our view, is available only to the past sales-tax dues which have intermingled with the properties of the Company. We have also noticed the caveat sounded by the Apex Court that the principle laid down in a decision is to be read in the context of the facts of that case.

In Union of India vs. Chajju Ram, (2003) 5 SCC 568, the Apex Court has laid down that - "it is now well settled that a decision is an authority for what it decides and not what can logically be deduced therefrom. It is equally well settled that a little difference in facts or additional facts may lead to a different conclusion."

In Haryana Financial Corporation vs. Jagdamba Oil Mills, (2002) 3 SCC 496, the Apex Court has made the following pertinent observations :-

"19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes."

In the said decision, the Apex Court quoted the following words of Lord Denning in the matter of applying precedents which have become locus classicus :-

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour

of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

24. In none of the following decisions relied upon on behalf of the petitioner the Court was concerned with the recovery of sales-tax dues or any indirect taxes for the period between the date of registration of the reference and the date of sanction of the rehabilitation scheme.

24.1 REAL VALUE APPLIANCES LTD. vs. CANARA BANK, (1998) 93 Comp. Cases 26

24.07.1997	BIFR registered the reference and called for information
28.07.1997	High Court appointed Receiver
08.08.1997	High Court restored the appointment of Provisional Liquidator
05.05.1998	The Supreme Court set aside the High Court's orders dated 28.7.1997 and 8.8.1997 on the ground that the inquiry had commenced; therefore, the Company was entitled to protection under Section 22(1) of the SICA.

In this case, there was no controversy about current tax dues. The recovery sought was of the dues of creditors for the period prior to the date of registration of the reference.

24.2 TATA DAVY LTD. vs. STATE OF ORISSA, (1998) 111 STC 462

1983-84 & 84-85	Company in arrears of sales-tax dues for these Assessment Years.
09.02.1988	Company declared as sick under SICA
23.12.1989	BIFR sanctioned the scheme.
	Coercive recovery of arrears of sales-tax for the aforesaid

period sought to be made by the Government by attachment of the properties.

1990 The High Court held that SICA did not override the sales-tax Act. Hence, protection under Section 22 not available.

04.08.1997 Supreme Court allowed the appeal.

In this case also, protection was granted against recovery of past sales-tax dues for the period prior to Company's registration as a sick industrial Company.

24.3 MODISTONE LTD. vs. STATE OF KERALA (2001) 105 Comp. Cases 183.

04.01.1998 Assessment order passed for Accounting Year 1993-94.
Tax arrears assessed Rs.1.44 crores.
Tax paid Rs.1.40 crores.

Hence, balance tax of only Rs.4 lakhs unpaid.

12.03.1998 Reference made before BIFR.

15.04.1998 Registration of the Company as a sick industrial Company under SICA.

1998 Single Judge of High Court granted interim stay against recovery of sales-tax subject to the condition that the Company pays one-fourth of the tax dues within one month.

02.12.1998 Division Bench of the High Court set aside the order of the Single Judge on the ground that protection under Section 22 is available as the inquiry must be treated as having commenced as soon as the registration of the reference is completed after scrutiny.

In this case also, protection was granted under

Section 22 against recovery of past sales-tax tax dues for the period prior to the date of registration and even prior to the date of reference.

24.4 DEPUTY CTO vs. CORROMANDAL PHARMACEUTICALS., (1997) 89 Comp. Cases 1 (SC)

19.11.1990 Scheme sanctioned by the BIFR

03.01.1994 Order for recovery of sales-tax 1995

In this case, the dues were admittedly the post-scheme dues.

24.5 PRANAMI PRESS vs. VINEDALE DISTILLERIES LTD., (1998) 94 Comp. Cases 926 (AP)

24.9.1991 BIFR sanctioned the Scheme for rehabilitation

1992-93 to 1994-95 For dues of this period, winding up petition was filed in 1997.

23.10.1997 High Court refused to grant protection under Section 22 for staying the winding up proceedings.

24.6 INDUSTRIAL CABLES (INDIA) LTD. VS. STATE OF PUNJAB, (2001) 105 COMP.CASES 541

12.07.1999 Company made reference to the BIFR under SICA
Reference registered by the BIFR

28.10.1999) BIFR passed interim orders
14.09.2000)

02.08.2000)
25.08.2000) Demand notices for sales-tax dues
05.10.2000)
02.11.2000)

21.11.2000 High Court granted protection under Section 22 of SICA.

After deciding the controversy, which was the only controversy, whether failure of the BIFR to complete the inquiry u/s. 16 within 60 days has the effect of rendering the reference infructuous and, therefore, the State can effect recovery of dues, the Court held that the period is not mandatory and, therefore, the inquiry cannot be treated as lapsed simply because the operating agency is not in a position to complete the inquiry within 60 days. It does not appear from the judgment that the dues were for the period after the date of registration of the Company as a sick industrial Company. The Court was not called upon to decide the controversy which is raised in the present case.

24.7 GRAM PANCHAYAT vs. SHREE VALLABH GLASS WORKS LTD., (1992) 86 STC 41(SC)

27.08.1997 BIFR declared the Company as sick industrial Company

Since the Apex Court was concerned with the case of the Company in the matter of recovery of arrears of property tax levied on the property of the Company, there was no question of passing on incidence of current tax to any other person, unlike the sales-tax liability which the Company passes on to the purchasers.

An analysis of the aforesaid cases, therefore, indicates that in the aforesaid cases, the Courts were considering coercive recovery of sales-tax dues being made by the State Government either for the period before the date of registration of the Company as a sick industrial company (Real Value Appliances, Tata Davy, Modistone) or for the period after the BIFR sanctioned the scheme for rehabilitation (Corromandal Pharma, Pranami Press). In none of these cases, the Court was concerned with the controversy in the present case : whether the State Government can call upon the Company to pay current sales-taxes being collected by the Company from its purchasers after registration of the Company as a sick industrial company and before sanction of the scheme by the BIFR.

25. This Court finds considerable substance in the submission of the learned AGP that the sales-tax amounts are recovered by the registered dealer under the Gujarat Sales-tax Act and the Central Sales-tax Act as an agent of the State Government, if not as a trustee. This Court is of the view that while Section 22 provides protection

against coercive recovery of past sales-tax amounts, in respect of the sales-tax amounts which the Company has not yet intermingled with the properties of the Company, the State Government is empowered and entitled to call upon the sick industrial Company not to intermingle the sales-tax amounts with the properties of the Company and to pay them over to the State Government.

26. While the BIFR can provide for rehabilitation package which may contain one particular date as the cut off date for crystallization of the dues of one creditor or a group of creditors, it is equally open to the BIFR to provide for any other cut off date for the dues of any other creditor or group of creditors. Ordinarily, the BIFR may not provide for different cut off dates if the creditors belong to the same category such as banks and public financial institutions (in whose case all the dues are past dues and interest accruing on the past dues), but a creditor like the State Government on whose behalf the petitioner continues to collect sales-tax amounts from the public at large is entitled to assert its right under sub-section (2) of Section 19 at any stage even before the preparation of the draft scheme - while it may give consent for tax reliefs or concessions or sacrifices for the sales-tax amounts already collected by the Company in the past and interest accruing thereon from time to time, the State Government is entitled to refuse straight away making any such reliefs, concessions or sacrifices for the future and to insist that whatever revival and rehabilitation package is to be prepared, as regards the recovery of such sales-tax dues from a future cut off date which may be specified by the State Government, the BIFR will have to stipulate such cut off date for the sales-tax dues in rehabilitation package to be prepared by the BIFR or the operating agency which may be appointed by the BIFR.

27. These petitions are pending before this Court since 1/2.7.2003 when the petitioner Company's reference was not even registered by the BIFR or the Appellate Authority under SICA. In the affidavits dated 1.10.2003 on behalf of the respondent-State Government, an assertion is made that the State Government is entitled to recover atleast the current dues, notwithstanding the provisions of Section 22 of the SICA, because the petitioner continues to collect the sales-tax from the purchasers. This stand of the State Government was also reiterated at the hearing before the Court on 15.10.2003, when the Court continued the interim relief against coercive recovery because the petitions were already admitted and interim relief was already granted on

13.8.2003. Hence, it would not be unfair or inequitable to the petitioner-Company to hold that the State Government is entitled to recover sales-tax dues from the petitioner hereafter i.e. from tomorrow onwards. It is clarified that this is with reference to the sales-tax liability of the petitioner accruing from 1.4.2004 onwards and that the respondent-State Government shall not, without the consent of the BIFR, recover any past sales-tax dues of the petitioner for the period till today (31.3.2004), and that the respondent-State Government shall also not make coercive recovery of any amount by way of interest accruing in future on the past sales-tax dues of the petitioner payable till 31.3.2004.

28. As regards the prayer to restrain the State Government from initiating criminal proceedings against the Company and its directors for non-payment of sales-tax dues, while such blanket relief cannot be granted in view of the decision of this Court in Vijay Mills Co.Ltd., (1999) 68 Comp.Cases 597, it will be appropriate for the State Government to consider this issue in proper perspective after finding out whether the petitioner-Company pays current sales-tax from 1.4.2004 onwards.

29. In view of the above discussion, the petitions are partly allowed. The respondent-State Government is restrained from making any coercive recovery of sales-tax dues from the petitioner for the period till today i.e. 31st March, 2004 without prior consent of the BIFR. However, it will henceforth be open to the State Government to take appropriate action in accordance with law and in light of the principles laid down in this judgment in respect of the sales-tax amounts being collected by the petitioner-Company from 1.4.2004 onwards.

The petitioner shall also inform the BIFR and the Operating Agency, if any, about the directions contained in this judgment.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

30. After the judgment is pronounced, Mr Soparkar, learned counsel for the petitioner prays for certificate of fitness to appeal under Article 133(1) of the Constitution.

In our view, since we have considered the questions arising in these matters in light of the decisions of the Hon'ble Supreme Court and various High Courts, and the reasons indicated in paragraphs 14 to 25 of the judgment make it clear that we are not taking a view which is at variance with the view taken by the other High Courts, this case does not involve a substantial question of law of general importance which needs to be decided by the Hon'ble Supreme Court.

The request is, therefore, rejected.

31. Mr Soparkar further prays for continuing the interim relief which was granted during pendency of these petitions for a period of one month to enable the petitioner to have further recourse in accordance with law.

Mr Siraj Gori, learned AGP opposes the request and submits that the petitioner is collecting sales-tax from its purchasers and, therefore, there should not be any extension of interim relief.

When we have already held that the petitioner is collecting sales-tax as an agent of the State Government and that the State Government has been demanding current sales-tax from the petitioner as per the stand of the Government in the affidavit dated 1.10.2003, the interests of justice do not demand any extension of interim relief. Moreover, when we have also held that the State Government cannot recover arrears of past sales-tax dues for the last many years aggregating to more than Rs.10 Crores, without the consent of the BIFR, there is no justification for restraining the State Government from recovering sales-tax payable by the petitioner from tomorrow i.e. for the period from 1.4.2004 onwards.

The request is, therefore, rejected.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

sundar/-